Supreme Court, U.S.
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No. 95-423

In The

Supreme Court of the United States

October Term, 1995

LILLIAN BROWN JOHNSON,
Petitioner,

vs.

THE STATE BAR OF CALIFORNIA,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

DIANE C. YU, S.B. # 78676
LAWRENCE C. YEE, S.B. # 84208
RICHARD J. ZANASSI, S.B. # 105044*
555 Franklin Street
San Francisco, California 94102
(415) 561-8200

Attorneys for Respondent
* Counsel of Record

71pp

QUESTIONS PRESENTED

1. Does the California Supreme Court's determination that recusal was not appropriate in light of petitioner's highly speculative and conclusory allegations of bias constitute a denial of due process or raise an important federal question which should be decided by this Court?

2. Whether petitioner's vague and unsupported claims of bias and financial interest on the part of the California Supreme Court and the State Bar of California raise an important federal question which should be decided by this Court?

3. Whether petitioner can challenge disciplinary rules and regulations on vagueness and due process grounds where (1) the language in the rules and regulations provides notice of the

proscribed conduct (2) petitioner was given formal notice of the proscribed conduct and the facts and circumstances alleged to have violated the rules and regulations in question prior to hearing (3) petitioner was afforded a full hearing at which time she was afforded an opportunity to address and refute the disciplinary charges and (4) petitioner made no objection on lack of notice/due process grounds until after the State Bar Court Review Department had recommended to the California Supreme Court that she be suspended from the practice of law.

4. Whether a federal constitutional question is raised by the action of the California Supreme Court in suspending petitioner from the practice of law because of conduct that involved the misappropriation of funds, the entering into a business transaction with a client

under terms and conditions that were neither fair nor reasonable, the failure to make any attempt to repay funds and the failure to rectify or atone for the misconduct, when petitioner was provided with an adversarial hearing before the Hearing Department of the State Bar Court, provided a second review hearing before the Review Department of the State Bar Court, and provided independent review by the California Supreme Court which ordered her suspended from the practice of law.

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

I

STATEMENT OF THE CASE

By order filed August 10, 1995, Petitioner, Lillian B. Johnson, an attorney found culpable of having, inter alia, "exploited a vulnerable, impecunious relative by improperly borrowing and not repaying the bulk of proceeds of a

personal injury settlement[1]," was suspended from the practice of law in California by the California Supreme Court for a period of five years, execution of suspension stayed, on conditions that included a period of actual suspension for two years and until proof of restitution in the amount of $20,550 is provided and a requisite showing of fitness is made under standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Conduct.[2]

In her petition before this Court, Petitioner contends that the evidence does

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[1] A copy of the State Bar Court Review Department decision is included in Petitioner's Appendix to Petition for Writ of Certiorari ("Petition") at p. E1. The California Supreme Court issued its own order, incorporating the recommendation of the Review Department of the State Bar Court.

[2] A copy of the order is included in petitioner's Appendix at pp. A1-A2.

not support the findings or recommended discipline and that the recommended discipline is erroneous and excessive (Petition for Writ of Certiorari, hereinafter "Petition," pp. 25, 28-29, 30-33). Petitioner further contends that her due process rights were violated because of an alleged "financial interest" on the part of the California Supreme Court, the trial examiner and hearing judge and the perceived existence of an unconstitutionally created State Bar Court (Petition, pp. 13-22). Finally, Petitioner challenges the constitutionality of selected rules and statutes that govern attorney disciplinary matters (Petition, pp. 22-34).

For the reasons set forth herein, the State Bar respectfully submits that the petition is entirely without merit and should be denied.

II

BACKGROUND

A. The Nature of the State Bar of California.

The State Bar of California is a public corporation established in the judicial branch of government for the purpose of performing governmental functions in the administration of justice. Cal. Const. art. VI, § 9; Cal. Bus. & Prof. Code, § 6001.

Historically, the State Bar has statutory authority to prosecute attorney disciplinary proceedings, Cal. Bus. & Prof. Code, § 6094.5, and the State Bar Court has statutory authority to adjudicate such proceedings, Cal. Bus. & Prof. Code, §§ 6079.1(a), 6086.5, 6086.65(d). However, the California Supreme Court retains inherent power to control all matters related to attorney

discipline. Jacobs v. State Bar, 20 Cal. 3d 191, 196, 141 Cal. Rptr. 812, 570 P.2d 1230 (1977); Cal. Bus. & Prof. Code § 6087; Cal. R. Ct. 951(g). "Final authority for disbarment [and suspension] rests not with the bar but with the state Supreme Court." Rosenthal v. Justices of the Supreme Court of California, 910 F.2d 561, 566-67 (9th Cir. 1990).

The State Bar Court includes a Hearing Department, which conducts formal trial proceedings, and a Review Department, which functions as an appellate body in independently reviewing, upon either party's request, determinations of the Hearing Department on a de novo basis. Cal. Bus. & Prof. Code, §§ 6079.1(a) and 6086.65(d); Rules Proc. of State Bar, rules 2.17 and 2.27, West's Cal. R. Ct. - State (1991 Supp. Pamph.), pp. 579-580.

The State Bar Court, in its present form, was created by statute effective January 1, 1989, and began to hear and adjudicate attorney disciplinary proceedings on September 1, 1989. Cal. Stats. 1988, ch. 1159; Cal. Bus. & Prof. Code, §§ 6079.1(f) and 6086.65(b). The Hearing Department of the State Bar Court is comprised of six full-time hearing judges. Cal. Bus. & Prof. Code, § 6079.1(a). The Review Department is comprised of three members, including a presiding judge and a lay judge. Cal. Bus. & Prof. Code, § 6086.65(a).

In establishing the State Bar Court to replace the volunteer system that existed prior to 1989, the California Legislature modelled the State Bar Court after courts of record. However, the State Bar Court remains subject to the inherent authority of the California

Supreme Court to regulate attorney discipline. The California Supreme Court appoints the State Bar Court judges and delegates authority to the judges, subject to the Supreme Court's ultimate control. Cal. R. Ct. 951(g), 952; Cal. Bus. & Prof. Code §6087; Brotsky v. State Bar, 57 Cal. 2d 287, 301, 19 Cal. Rptr. 153, 368 P.2d 697 (1962).

While the grant of a writ of review of a State Bar disciplinary proceeding by the California Supreme Court is discretionary, Cal. R. Ct. 952, 954, all actions of the State Bar Court regarding attorney discipline are subject to the independent and plenary review of the California Supreme Court. Cal. Bus. & Prof. Code §§ 6082, 6083, 6087, 6100; Cal. R. Ct. 951(g). If no timely petition for review is filed, the recommendation of the State Bar Court for disbarment or

suspension is filed as an order of the Supreme Court. Cal. R. Ct. 953(b); see also Cal. Bus. & Prof. Code, § 6084. That is to say, the Supreme Court issues its own order, which is filed by the Clerk, incorporating the recommendations of the State Bar Court.

In petitions for writ of review of State Bar Court proceedings pursuant to rule 952 of the California Rules of Court, a conference memorandum is prepared with a recommendation on the petition by central staff of the California Supreme Court. The conference memorandum is distributed to the justices of the Court no later than Tuesday of the week before the assigned date for consideration of the petition by conference of the Court. Int. Op. Prac. & Proc. of the S.Ct. of Cal. IVB3, IVG1. The Court will order review when it appears (1) necessary to settle important

questions of law; (2) the State Bar Court has acted without jurisdiction; (3) petitioner did not receive a fair hearing; (4) the decision is not supported by the weight of the evidence; or (5) the recommended discipline is not appropriate in light of the record as a whole. Cal. R. Ct. 954.

B. Procedural History

On October 7, 1991, a three count notice to show cause was filed against Petitioner. The notice was answered by Petitioner on December 2, 1991.

On January 8, 1992, the State Bar filed a motion to dismiss the second and third causes of action. The motion was granted by the Hearing Department on January 14, 1992. Count One, which alleged that Petitioner misappropriated funds, failed to honor a medical lien and failed to perform competently, remained.

On September 23, 1992, the scheduled hearing was continued as the State Bar moved to amend the notice to add an additional charge of commingling. On October 28 and 29, 1992, the matter came on for hearing, at which time the State Bar was directed to file an amended Notice. On November 2, 1992, a first amended Notice to Show Cause was filed. The Notice was answered by Petitioner on November 13, 1992.

On November 20, 1992, following post-trial briefing, the matter was initially submitted for decision. However, on March 1, 1993, the Hearing Judge, on his own motion, reopened the hearing to allow the parties to present additional evidence on an allegation that Petitioner had violated former Rule 5-101 of the Rules of

Professional Conduct[3], which allegation had only become apparent during the course of the October 28th and 29th hearings. Further hearings were held on April 29, 1993, and on June 7, 8, 21, and 28, 1993.

On July 30, 1993, the Hearing Judge issued his decision, recommending that Petitioner be suspended from the practice of law for five years, stayed, on conditions that included a two year period of actual suspension and restitution of $22,910 within the two year period.

On August 30, 1993, Petitioner submitted an Application for Review by the Review Department. On September 13, 1993, the Review Department issued an Order to Show Cause Why Request for Review Should Not Be Dismissed, based on Petitioner's failure to make the required deposit for

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[3] References to "Rules" are to the Rules of Professional Conduct.

the cost of the transcript. Petitioner thereafter requested an extension of time to deposit the fees for the transcript and was granted an extension to October 15, 1993. On November 9, 1993, following deposit of the required fee by Petitioner, the transcripts were served on Petitioner.

On November 30, 1993, Petitioner filed a Motion for a Continuance and Motion to Settle Reporter's Transcript on Appeal, based on an error involving the transcripts. A supplement to the Motion was filed on December 12, 1993. On January 26, 1994, the Review Department granted Petitioner's motion and allowed Petitioner additional time to file her opening brief.

On March 26, 1994, Petitioner filed her opening brief. On May 2, 1994, the State Bar filed its response. On May 23, 1994, Petitioner filed a Motion to File a

Reply Brief, which motion was opposed by the State Bar, and on June 4, 1994, she filed a Motion for Postponement of Oral Argument for the Purpose [of filing] a Reply Brief. On June 16, 1994, the Review Department issued an order denying Petitioner's motions without prejudice to Petitioner making a request at the time of oral argument for leave to file a supplemental brief.

On June 29, 1994, oral argument was presented before the Review Department, at which time Petitioner was granted leave to file a Reply Brief. On July 28, 1994, Petitioner submitted her Reply Brief. On January 23, 1995, following additional briefing by both parties on various issues, the Review Department filed its Opinion on Review.

Petitioner thereafter filed a Motion for Reconsideration, which was opposed by

the State Bar. On March 6, 1995, the Review Department denied Petitioner's Motion. On March 3, 1995, Petitioner served a Motion to File Supplement to Motion for Reconsideration which was also opposed by the State Bar. On March 21, 1995, the Review Department denied Petitioner's Motion for lack of showing of good cause as to why the proposed additional arguments were not included in her motion for reconsideration.

On April 28, 1995, the State Bar Court's file and recommendation in this matter were transmitted to the California Supreme Court. On June 27, 1995, Petitioner filed a Petition for Review of Decision with the California Supreme Court. On July 13, 1995, the State Bar of California filed its Memorandum Response in Opposition to Petition for Review. On or about July 24, 1995, Petitioner filed a

document entitled "Petition for Disqualification and Removal of Justices and Appoint Disinterested Court of Appeals Justices to Hear and Motion to Declare State Bar Court Statutes, Rules, Regulations and Standards Unconstitutional."

On August 10, 1995, the Supreme Court issued its order denying Petitioner's Petition for Review and Petition for Disqualification. The Court further ordered that Petitioner be suspended from the practice of law for five years, execution of suspension stayed, on conditions that included actual suspension for two years and until restitution is completed and proof of rehabilitation, fitness to practice and learning and ability in the general law is established.

C. Statement of Facts

Petitioner was admitted to the

practice of law on June 27, 1975 and at all times herein mentioned was a member of the State Bar. Petitioner has no prior record of discipline.

Petitioner's misconduct in the present proceeding centered around her "overreaching at the expense of her sister-in-law, now deceased, a woman of limited income, in poor health, who lacked sophistication in business matters." (Appendix, p. E1.) The factual findings documenting Petitioner's misconduct are fully set forth in the Opinion on Review and are summarized below. (Appendix, pp. E1-E31.)

In or about 1982, Margie L. Brown[4], sister-in-law of Petitioner, retained Petitioner to represent her in a personal injury matter. Petitioner and Brown

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[4] Ms. Brown died in January 1992.

orally agreed that the matter would be handled on a contingency basis with Petitioner to recover 40 per cent on any settlement as attorney's fees. In September 1986, the parties agreed to settle Ms. Brown's case for $40,000. This amount was electronically transferred directly to a personal account maintained by Petitioner, although insurance company records noted that the account was a trust account. (Appendix, p. E3.)

Pursuant to the oral retainer agreement, Ms. Brown was entitled to receive $24,000 less $200 in estimated court costs. Petitioner admitted that none of the proceeds went to Ms. Brown.

Petitioner represented that Ms. Brown agreed to loan her, without security, $19,860, which Petitioner used as a down payment on the purchase of a residence. Of the remaining amount due Ms. Brown,

$140 represented cash Petitioner advanced Ms. Brown prior to the settlement, $3,250 represented an amount Ms. Brown agreed to pay for legal services provided by Petitioner in two prior legal matters, and $750 was allegedly given to Ms. Brown in cash at the time the insurance release was executed. (Appendix, p. E3.)

In support of her contention, Petitioner introduced into evidence a promissory note, dated September 26, 1986, that required Petitioner to pay Ms. Brown $19,860 with 10 per cent interest on or before January 31, 1991. Petitioner also produced an unsecured agreement, dated September 19, 1986 and signed by both herself and Ms. Brown, which provided that Ms. Brown agreed to loan Petitioner $20,000 so as to allow Petitioner to purchase real property. The agreement further provided that Ms. Brown agreed to

pay Petitioner legal fees in the amount of $2500 for a prior criminal case handled by Petitioner and $750 for a previous damage claim that had been filed against Ms. Brown. There was no mention of the alleged cash advancement in the agreement. (Appendix, p. E3-E4.)

The Review Department found that a loan was made from Ms. Brown to Petitioner. However, Petitioner's conduct with respect to the loan was found to have been in violation of former rule 5-101, Rules of Professional Conduct. The terms of the loan were clearly unfair in that Petitioner failed to provide any security for the loan and the loan did not provide for any payments to Ms. Brown until January 1991, which was deemed unreasonable in light of the financial situation of Ms. Brown. Petitioner also failed to describe such terms as the

assignment of a security interest or other lien against the real property that Petitioner acquired with the loan proceeds, which could have safeguarded Ms. Brown's interests[5]. In addition, Ms. Brown's written consent was not a knowing one because she was incapable of giving informed consent and her incapacity was known to Petitioner. (Appendix. pp. E16-E19.) As noted by the State Bar Court Hearing Judge:

> "At the time of the settlement, Brown was unmarried, having been widowed in 1975, poor, unsophisticated, 54 years of age, not well educated, and was helping to support several of her adult-age children, and several grandchildren, with her meager income as a part-time housekeeper and from Social Security. At the time the case settled, Brown was in poor

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[5] Petitioner failed to make the mortgage payments on the real property purchased with the funds loaned to her by Ms. Brown, resulting in the property being lost to foreclosure in 1989.

> health, but not as acutely ill as she later became, and was regularly drinking alcoholic beverages to excess. Brown's difficult circumstances and corresponding vulnerability were known to Respondent at the time the loan agreement was executed." (July 30, 1993, Decision of Hearing Department.)

Although the Hearing Judge concluded that Petitioner misappropriated the funds in question, the Review Department found that Petitioner did not misappropriate a majority of the settlement proceeds as the funds were obtained pursuant to the loan agreement. (Appendix, pp. E9-E13, E22-E25.) The Review Department did find that Petitioner misappropriated the cash payments alleged by Petitioner to have been advanced to Ms. Brown, finding that such payments had never been made. (Appendix, pp. E6-E8, E24-E25.) The Review Department further found that Petitioner had violated the provisions of

former rule 8-101 in that he commingled the settlement proceeds with personal funds by failing to place the funds in a trust account and failed to promptly pay over funds to Ms. Brown. (Appendix, pp. E25-E26.)

The Review Department concluded that Petitioner's misappropriation of funds, as well as her having "exploited her superior knowledge and position of trust to the detriment of a vulnerable client" constituted moral turpitude. (Appendix, p. E24.)

In determining the appropriate degree of discipline, the Review Department considered both mitigating and aggravating factors presented by the parties. (Appendix, pp. E26-E28.) The Review Department, while giving weight to Petitioner's lack of a prior record of discipline, expressed serious concern over

Petitioner's indifference towards rectifying the harm she caused and her lack of candor throughout the hearing:

> "There is other aggravating evidence in this case. Respondent's misconduct involved multiple acts of wrongdoing, and significantly harmed her client. She showed indifference towards rectifying or atoning for her misconduct and has failed to make any attempt to repay the loan, or to contact the heirs. The hearing judge's decision is replete with examples of respondent's lack of candor at the hearing. The carelessness with which respondent lost control of between four and five hundred case files when her practice closed raises grave doubts about her ability to protect the interests of other clients as well." (Appendix, p. E28.)

III

ARGUMENT

A. The California Supreme Court's Determination that Recusal Was Not Appropriate and its Subsequent Order Imposing Discipline Does Not Raise Due Process or Important Federal Questions.

Review on a writ of certiorari is not a matter of right and will be granted only where there are special and important reasons. Rule 10, Rules of the Supreme Court of the United States. None of the reasons set forth in rule 10 are present here. There is no decision by a federal appellate court (rule 10(a)); the California Supreme Court decision at issue does not conflict with that of another state court of last resort or of a federal appeals court (rule 10(b)); and the California Supreme Court decision at issue does not decide an important question of federal law that should be decided by this Court, nor is it in conflict with any decision of this Court (rule 10(c)).

Moreover, Petitioner's empty claims regarding the "partisan" nature of the Supreme Court are groundless and do not warrant recusal. Petitioner baldly

asserts that recusal of the California Supreme Court was required under the due process clause because of the alleged "partisan" role of the California Supreme Court in disciplinary matters. (Petition, pp. 12-13.)[6] However, Petitioner offers no legal authority in support of her contention. Rather than present evidence that would demonstrate a direct, personal, substantial pecuniary interest by the Court, Petitioner merely proffers highly speculative and conclusory allegations of bias. See Aetna Insurance Co. v. LaVoie, 475 U.S. 813, 822, 106 S. Ct. 1580, 89 L. Ed. 2d 823 (1986).

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[6] The procedure for recusal of appellate justices was set forth in Kaufman v. Court of Appeal, 31 Cal. 3d 933, 184 Cal. Rptr. 302, 647 P.2d 1081 (1982), where the court found that state appellate justices follow the federal standard which allows each justice to decide for himself/herself whether the facts require recusal.

Petitioner further fails to establish that the California Supreme Court acted improperly in issuing its disciplinary order following Petitioner's recusal argument. To the contrary, it was entirely proper for the California Supreme Court to be given the opportunity to decide the issues of alleged bias of its individual members for itself. Flangas v. State Bar of Nevada, 655 F.2d 946, 950 (9th Cir. 1981).

B. Petitioner's Challenge to the Constitutionality of the California Regulatory System is Without Merit.

As best as can be understood from Petitioner's brief, it appears that Petitioner attempts to challenge the constitutionality of the structure of the California regulatory system based on allegations that the State Bar Court was impermissibly created. (Petition, pp. 18-

19.) Petitioner, who decided to raise this argument for the first time on appeal to the California Supreme Court, offers no pertinent authorities to support her contention.

Two decisions by the California Supreme Court, Lebbos v. State Bar, 53 Cal. 3d 37, 278 Cal. Rptr 689, 806 P.2d 317 (1991) and Conway v. State Bar, 47 Cal. 3d 1107, 255 Cal. Rptr. 390, 767 P.2d 617 (1989), expressly rejected the argument that the California disciplinary system represents an improper delegation of judicial authority that violates the Constitution. Both Lebbos and Conway were decided under the pre-1989 disciplinary system in which the State Bar Court was comprised of volunteers appointed by the State Bar Board of Governors. However, both decisions have even stronger force in establishing the legality of the present

disciplinary system in which full-time State Bar Court judges are appointed directly by this Court. (Bus. & Prof. Code § 6079.1.) The main point of the two decisions is that an attorney disciplinary system over which this Court maintains final authority and control is constitutional. As the Court held in Lebbos, "...the judicial power in disciplinary matters remains with the [Supreme] Court, and was not delegated to the State Bar." Lebbos, supra, 53 Cal. 3d at p. 48. This reasoning similarly applies to the present reconstituted State Bar Court, whose recommendations are subject to immediate and plenary review by the Supreme Court.

The United States Ninth Circuit Court of Appeals, in its recently published decision in Hirsch v. Justices of the Supreme Court of the State of California,

No. 94-55240, Slip. Op. at 11141 (9th Cir. Sept. 7, 1995)[7] rejected similar arguments advanced by other respondent attorneys who were involved in state disciplinary proceedings.

C. Petitioner's Broad Claims of Financial Interest and Bias by the California Supreme Court, the State Bar Court and Trial Examiner are Frivolous, Unsupported By Any Evidence and Entirely Without Merit.

Although confusing, Petitioner appears to contend that the California Supreme Court, the State Bar Court judges and the trial examiners have an improper financial interest in the outcome of disciplinary proceedings in violation of her due process rights. (Petition, pp. 13-17.)

Again, Petitioner's bald argument is without support in law or fact and is

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[7] Attached hereto as Appendix A.

entirely without merit. Petitioner presents no evidence of bias or any "direct, personal, substantial, [and] pecuniary interest" by either the Supreme Court, the State Bar Court or the State Bar trial examiners in the outcome of the case. See Aetna Life Insurance Company v. LaVoie, 475 U.S. 813, 106 S. Ct. 1580, 89 L. Ed. 823 (1986). Petitioner further fails to present any evidence that the aforementioned parties received improper payments to influence attorney disciplinary proceedings or that they are competitors who have a financial interest in seeing Petitioner disciplined. See Gibson v. Berryhill, 411 U.S. 564, 577-79, 93 S. Ct. 1689, 36 L. Ed. 2d 488 (1973). Rather, Petitioner merely proffers speculative and conclusory allegations of a financial conflict and fails to establish that her "due process" rights

were violated.

Moreover, contrary to Petitioner's direct attack on the State Bar Court (Petition, pp. 13-15), there is no personal financial incentive for the State Bar Court judges to find an attorney culpable. The salaries of the State Bar Court judges are set by statute and are unaffected by the imposition or collection of costs. (Bus. & Prof. Code § 6079(d).) In addition, the sums collected from disciplinary costs are de minimis and have no effect on the State Bar's expenditures in carrying out its disciplinary functions. Petitioner presents no evidence that the salaries of the judges are dependent on the amount of costs collected or that the State Bar would be unable to pay the judges salaries without the money collected for costs.

The Ninth Circuit dismissed similar

frivolous claims in Hirsch v. Justices, supra, at 11150-52. The Court specifically rejected contentions that the California attorney disciplinary system was unconstitutionally tainted by bias because of alleged financial interest in the prosecution and outcome of disciplinary matters. The Court noted that, as here, plaintiffs in those proceedings had offered no evidence that the justices or judges received improper payments to influence attorney disciplinary proceedings or that they are competitors who might have a financial interest in seeing attorneys disbarred. The Court further held that "[a]lthough the State Bar pays the salaries of the Bar Court judges, the salaries are set by statute, see Cal. Bus. & Prof. Code § 6079(d), and no evidence suggests that they are in any way dependent on the

amount of fines collected or that the State Bar would be unable to pay the salaries of Bar Court judges without the money collected in disciplinary proceedings, which totals less that 1% of the State Bar Revenues (Footnote)." Id. at 11151.

Petitioner's reliance on In the Matter of Ross, 656 P.2d 832, 99 Nev. 1 (1983) and Ward v. Village of Monroeville, Ohio, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972) is unpersuasive. In Ross, the Nevada attorney disciplinary proceedings were deemed inconsistent with due process where the members of the State Bar Board of Governors served as both judicial officers and bar executives with responsibility to protect the financial integrity of the bar. In the instant matter, neither the State Bar's Office of Trials nor the State Bar Court judges have

any responsibility for the budget or financing of the Bar. That responsibility falls upon the Board of Governors, subject to the review and approval by the State Legislature. Cal. Bus. & Prof. Code, sections 6140, 6140.1. As such, no commingling of functions exists under the California disciplinary system.

In Ward, the Court found that a Mayor with executive responsibilities could not be regarded as an impartial judge where fines levied by him provided a substantial portion of the township's finances. Nothing like the Mayor's Court is present here as revenues from costs imposed are de minimis. See Hirsch v. Justices, supra, at 11151.

D. **Petitioner's Contention that Charged Sections of the State Bar Act and Rules of Professional Conduct Are Unconstitutional is Void of Merit.**

Having failed to establish at the State Bar Court level that the evidence was insufficient to support findings of culpability, Petitioner decided to argue on petition to the California Supreme Court that the charging rules and statutes are vague and fail to provide adequate notice of the prohibited conduct. (Petition, pp. 5, 7-10.) Petitioner repeats those contentions before this Court. (Petition, pp. 19-22.) Petitioner's contention is completely without merit.

To show that a statute or rule is unconstitutionally vague on its face, it must be proven that "the enactment is vague 'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.'"

Village of Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 495, fn. 7, 102 S.Ct. 1186, 1191, fn. 7, 71 L.Ed. 2d 362, (1982); see also Jordan v. DeGeorge, 341 U.S. 223, 71 S. Ct. 703, 707, 95 L. Ed. 886 (1951) (test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.) Moreover, "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness." Id. (citing Parker v. Levy (1974) 417 U.S. 733, 756, 94 S.Ct. 2547, 2567, 41 L.Ed.2d 439; In Re Kelly (1990) 52 Cal. 3d 487, 497, 276 Cal. Rptr. 375, 801 P.2d 1126 (1990)).

The statutes and rules require nothing more than is clearly required of all attorneys--that they conform their conduct according to the law and that

violation of the law will subject them to professional discipline. See In Re Kelly, supra, 52 Cal. 3d at 497. The record in this case demonstrates that Petitioner received notice of the charges filed and that several days of hearings were held, during which time evidence was presented concerning the charges. The rules and statutes clearly set forth the type of conduct that was prohibited, Petitioner contested those charges and presumably offered evidence in an attempt to refute those charges, but was unable to persuade the State Bar Court that the facts did not support the findings of culpability. See, e.g., Order Re-Opening Record, filed March 1, 1993 (Hearing Judge reopened record to allow parties to present additional evidence of various charges, including the rule 5-101 charge. Additional hearings were held on April 29, 1992 and on June

7,8,21, and 28, 1993.) It is disingenuous for Petitioner to now contend that there was insufficient notice of the prohibited conduct. See Brockway v. State Bar, 53 Cal. 3d 51, 63, 278 Cal. Rptr 836, 806 P.2d 308 (1991) (attorney never objected to introduction of evidence on lack-of-notice grounds).

Specifically, Petitioner challenges Rule 5-101, Rules of Professional Conduct of the State Bar, Business and Professions Code Section 6106 and Rule 8-101, Rules of Professional Conduct. The requirements under Rule 5-101 are clear and the agreement was unfair to Petitioner's client for the reasons set forth in the State Bar Court decision. (Appendix, pp. E16-E19.) The fact that Petitioner does not understand that such an agreement would constitute a rule 5-101 violation does not render the rule vague.

Petitioner's challenge to California Business and Professions Code section 6106 is likewise without basis. It is difficult to conceive of how an attorney who engaged in conduct whereby she "exploited her superior knowledge and position of trust to the detriment of her vulnerable client" and misappropriated client funds can contest the application of section 6106. See Jordan v. DeGeorge, supra, 341 U.S. 223, 71 S. Ct. 703, 705, 95 L. Ed. 886 (1951), (statute relating to deportation of illegal alien sentenced because of crime involving moral turpitude was not unconstitutional for vagueness in meaning of the phrase "crime involving moral turpitude"); Morrison v. State Board of Education, 1 Cal. 3d 214, 227-229, 82 Cal. Rptr. 175, 461 P.2d 375 (1969).

Finally, Petitioner's challenge to former rule 8-101(B)(4) is without merit.

(Petition for Review, p. 14.) Former rule 8-101(B)(4) requires an attorney to promptly pay or deliver to the client, upon demand, the property in the attorney's possession to which the client is entitled. As noted by the Review Department, the settlement funds had a "mixed character," with a portion of the funds belonging to Petitioner and a portion to Ms. Brown. The State Bar Court found that at least $700 of the funds received was promptly owed to Ms. Brown, that Ms. Brown made a demand for the funds, and that Petitioner's failure to "place the proceeds in a trust account and pay the remainder promptly to Ms. Brown violated the trust account rules." (Appendix A, p.19.) Petitioner was put on notice of this misconduct and such conduct violated the provisions of former rule 8-101(B)(4).

E. Petitioner Has Failed to Demonstrate that the Recommended Discipline was Erroneous.

The purpose of the disciplinary process is to protect the public, the courts and the legal profession from unfit practitioners, preserve public confidence in the profession and maintain the highest of professional standards for attorneys. Smith v. State Bar, 37 Cal. 3d 17, 26, 206 Cal. Rptr. 845, 687 P.2d 259 (1984); Standard 1.3, Standards for Attorney Sanctions for Professional Misconduct.) In light of these objectives, Petitioner has failed to establish that the recommended discipline is improper, erroneous or unlawful.

In disciplinary proceedings, each case is determined on its own set of facts and circumstances. Doyle v. State Bar, 15 Cal. 3d 973, 978, 126 Cal. Rptr. 801, 544 P.2d 937 (1976). Here, the record

demonstrates that Petitioner misappropriated client funds, commingled trust funds with personal funds and improperly solicited a loan from a vulnerable client following the client's receipt of a large settlement. Particularly egregious was Petitioner's overreaching at the expense of her sister-in-law, a vulnerable woman of limited income, in poor health, and who lacked sophistication in business matters. As the Review Department concluded:

> "Here, respondent's family ties to her client, her sister-in-law, made respondent all the more aware of the client's vulnerabilities and the considerable trust the client placed in respondent. Rather than honoring that trust, respondent exploited it for her own benefit and to the harm and detriment of the client." (Appendix, pp. E27-E28.)

Although only minimal factors in mitigation were present, Petitioner's

conduct was aggravated by several factors, including misconduct that involved multiple acts of wrongdoing and significantly harmed her client, lack of candor at the hearing and indifference towards rectifying or atoning for her misconduct. Perhaps most telling is the fact that Petitioner has failed to make any attempt to repay to funds, either to Ms. Brown prior to her death or to her heirs.

In light of the aforementioned conduct, which was found to have involved moral turpitude, the recommended discipline is not unjustified. See, e.g., Lawhorn v. State Bar, 43 Cal. 3d 1357, 240 Cal. Rptr. 848, 743 P.2d 908 (1987); Beery v. State Bar, 43 Cal. 3d 802, 239 Cal. Rptr. 121, 739 P.2d 1289 (1987); standard 2.3 (discipline for acts of moral turpitude includes actual suspension or

disbarment, depending on the extent of the harm to the victim, the magnitude of the act, and its relationship to the practice of law.)

IV

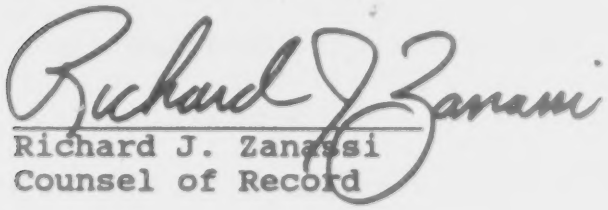
CONCLUSION

For each of the foregoing reasons, the State Bar respectfully submits that the petition should be denied.

DATED: October 3, 1995

Respectfully submitted,

Diane C. Yu
Lawrence C. Yee
Richard J. Zanassi



Richard J. Zanassi
Counsel of Record

Attorneys for Respondent
The State Bar of California

Appendix A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STUART H. HIRSH,
Plaintiff-Appellant,

v.

JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA: MALCOLM L. LUCAS; EDWARD PANELLI; JOYCE KENNARD; ARMAND ARABIAN; MARVIN BAXTER; RONALD M. GEORGE; and DAN LUNGREN, State Attorney General & acting personally for his private appointee's financial gain; STATE BAR OF CALIFORNIA; ELLEN R. PECK, Employee of the State Bar as a claimed Judge; DAVID C. CARR, Employee Prosecutor of State Bar Association,
Defendants-Appellees.

No. 94-55240
D.C. No.
CV-93-04114-SVW
ORDER AND
OPINION

RALPH F. SERVER,
Plaintiff-Appellant,

v.

SUPREME COURT OF THE STATE OF CALIFORNIA; STATE BAR OF CALIFORNIA,
Defendants-Appellees.

No. 94-55250
D.C. No.
CV-93-06789-SVW

HAROLD LENARD PERRY,
Plaintiff-Appellant,

v.

JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA: MALCOLM LUCAS, Chief; EDWARD PANELLI; STANLEY MOSK; JOYCE KENNARD; ARMAND ARABIAN; MARVIN BAXTER; RONALD GEORGE; and DAN LUNGREN; LISE PERLMAN, et al.,
Defendants-Appellees.

No. 94-55507
D.C. No.
CV-93-06909-SVW

Appeals from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

EDMUNDO B. ESPINOZA,
Plaintiff-Appellant,

v.

MALCOLM LUCAS; HONORABLE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA; KATHRYN MICKLE; STANLEY MOSK; JOYCE KENNARD; ARMAND ARABIAN; MARVIN BAXTER; RONALD GEORGE; and DAN LUNGREN, State Attorney General,
Defendants-Appellees.

No. 94-56335
D.C. No.
CV-94-01299-MLH

Appeal from the United States District Court
for the Southern District of California
Marilyn L. Huff, District Judge, Presiding

Argued and Submitted
March 7, 1995—Pasadena, California
Memorandum Filed March 29, 1995

Order and Opinion Filed September 7, 1995

Before: James R. Browning and Robert R. Beezer, Circuit Judges, and Ancer L. Haggerty,* District Judge.

Per Curiam

SUMMARY

Attorneys and Judges/Professional Responsibility/ Civil Litigation and Procedure

The court of appeals affirmed a district court judgment. The court held that the district court did not err in dismissing on abstention grounds suits seeking an injunction to stop pending California attorney disciplinary proceedings and a declaratory judgment that the disciplinary system is unconstitutional.

Under California law, attorney disciplinary matters are handled by the State Bar Court, an administrative agency that is affiliated with the California State Bar Association (State Bar). The Bar Court's Hearing Department conducts formal adversarial hearings, and makes findings and recommendations regarding discipline. An attorney may appeal to the Bar Court's Review Department, which makes its own recommendation. The attorney may then file a petition for review with the California Supreme Court, which can either grant or deny review. The Supreme Court retains inherent jurisdiction over attorney disciplinary matters throughout the process.

*Honorable Ancer L. Haggerty, District Judge, United States District Court for the District of Oregon, sitting by designation.

Facing pending attorney disciplinary proceedings in California, appellants Stuart Hirsh, Ralph Server, Harold Perry and Edmundo Espinoza (collectively, Appellants) filed civil rights actions in the district court, alleging deprivation of various constitutional rights. The suits named as defendants appellees the Justices of the California Supreme Court, the State Attorney General, the State Bar, the Bar Court and the respective Bar Court judges and prosecutors involved. The Appellants sought an injunction to stop the pending disciplinary proceedings, a declaratory judgment that the disciplinary system is unconstitutional and monetary damages. The district court granted the government's motions to dismiss. The court dismissed each case on the ground that *Younger v. Harris* required abstention. The Appellants appealed.

[1] *Younger* and its progeny generally direct federal courts to abstain from granting injunctive or declaratory relief that will interfere with pending state judicial proceedings. [2] In this case, each of the Appellants faced ongoing disciplinary proceedings when he brought suit in federal court. [3] The ongoing proceedings were judicial in character. [4] The attorney disciplinary proceedings implicated important state interests. [5] Federal constitutional claims may be raised in judicial review of the Bar Court's decision; [6] the fact that review is discretionary does not bar presentation of federal claims by appellants.

[7] The Appellants failed to overcome a presumption of honesty and integrity. [8] They offered no evidence that the justices or judges received improper payments to influence attorney disciplinary proceedings or that they might have a financial interest in seeing them disbarred. [9] The fact that fines imposed in attorney disciplinary proceedings are paid to the State Bar treasury did not establish an impermissible financial interest. [10] The Appellants offered only conjecture to support their claim that Supreme Court justices are impermissibly biased because they appoint Bar Court judges. [11] The absence of a mandatory statutory recusal mechanism

applicable to California Supreme Court justices did not make a showing of bias unnecessary.

[12] The Appellants were incorrect in contending that abstention was inapplicable because the California disciplinary system allegedly involves an unconstitutional delegation of power, violates separation of powers and deprives them of a right to vote.

[13] All of the defendants were immune from liability for monetary damages. The Eleventh Amendment's grant of sovereign immunity bars monetary relief from state agencies, such as the California Bar Association and Bar Court. The immunity extended to the individual defendants acting in official capacities. [14] The individual defendants were also immune in their individual capacities.

COUNSEL

Stuart H. Hirsh and Ralph F. Server, Beverly Hills, California, Harold L. Perry, Oakland, California, and Edmundo Espinoza, San Diego, California, in pro per for the plaintiffs-appellants.

Robert M. Sweet, Marina Del Rey, California, for the defendants-appellees.

ORDER

The memorandum disposition filed March 29, 1995, is redesignated as a per curiam opinion.

OPINION

PER CURIAM:

Facing pending attorney disciplinary proceedings in California, each appellant filed suit in federal court under 42 U.S.C. § 1983, alleging deprivation of various constitutional rights. The district court granted the government's motions to dismiss. We affirm.

I. *Background*

A. The California Attorney Disciplinary System

Under California law, attorney disciplinary matters are handled by the State Bar Court ("Bar Court"), an administrative agency affiliated with the California State Bar Association ("State Bar"). Calif. Bus. & Prof. Code § 6086.5. The Bar Court is divided into a Hearing Department and a Review Department. *Id.* §§ 6079.1, 6086.65. Disciplinary proceedings are commenced by serving the accused attorney with a Notice to Show Cause. The Hearing Department then conducts a formal adversarial hearing during which the accused attorney and a State Bar prosecutor present evidence before a Bar Court judge. The Hearing Department makes findings and a recommendation regarding appropriate discipline. The attorney may appeal to the Review Department, which reviews the Hearing Department's findings de novo and makes its own recommendation. The attorney may then file a petition for review with the California Supreme Court.[1] *Id.* § 6082. The Supreme Court either grants review and issues a final order or denies review, in which case the Bar Court's recommendation is filed as an order of the Supreme Court. *Id.* § 6084; Calif.

[1]If no petition for review is filed, the Bar Court's recommendation becomes a final order of the California Supreme Court, although the Supreme Court may review the recommendation on its own motion. *Id.* § 6084; Calif. Court Rule 953(b).

Court Rule 954. Throughout this process, the Supreme Court retains inherent jurisdiction over attorney disciplinary matters. *Id.* 951(g).

B. The Federal Suits

Each of the suits named as defendants the Justices of the California Supreme Court, the State Attorney General, the State Bar, the Bar Court, and the respective Bar Court judges and prosecutors involved. The appellants sought an injunction to stop the pending disciplinary proceedings, a declaratory judgment that the disciplinary system is unconstitutional, and monetary damages based on alleged deprivations of state and federal constitutional rights. The complaints allege that the disciplinary system deprives appellants of various constitutional rights, including due process, equal protection, the right to vote, and the right to court access. The district court dismissed each case on the ground that *Younger v. Harris*, 401 U.S. 37 (1971), required abstention.

II. *Abstention from Granting Injunctive and Declaratory Relief*

A. Requirements for Abstention

[1] *Younger* and its progeny generally direct federal courts to abstain from granting injunctive or declaratory relief that would interfere with pending state judicial proceedings. *Id.* at 40-41; *Samuels v. Mackell*, 401 U.S. 66, 73 (1971) (extending *Younger* to declaratory judgments). Absent "extraordinary circumstances", abstention in favor of state judicial proceedings is required if the state proceedings (1) are ongoing, (2) implicate important state interests, and (3) provide the plaintiff an adequate opportunity to litigate federal claims. *See Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). Each prerequisite is satisfied in each of these cases.

1. *Ongoing State Proceedings*

[2] Each appellant faced ongoing disciplinary proceedings when he brought suit in federal court. *See Beltran v. State of California*, 871 F.2d 777, 782 (9th Cir. 1988) (stating that abstention requires proceedings to be ongoing at the time plaintiff initiates federal proceedings). Notices to Show Cause had been directed to Hirsh and Espinoza, and the California Supreme Court had not yet filed an order regarding the Bar Court's recommendations with respect to Perry and Server. *See Flangas v. State Bar of Nevada*, 655 F.2d 946, 949 (9th Cir. 1981) (holding proceedings were ongoing where state Board of Bar Governors had recommended discipline but final binding action had yet to be taken by the Nevada Supreme Court).

[3] The ongoing proceedings were judicial in character. Under California's discipline system, the Hearing Department conducts a formal hearing and makes findings, the Review Department conducts a de novo review of those findings, and the Supreme Court retains inherent jurisdiction over the proceedings, including power to review the Bar Court's findings. Appellants point to no relevant distinction between this procedure and that held to be judicial in nature in *Middlesex*. 457 U.S. at 433-34; *see also Partington v. Gedan*, 880 F.2d 116, 122 (9th Cir. 1989) (attorney disciplinary proceedings conducted by an ethics committee or its equivalent under the auspices of the state supreme court are judicial for purposes of *Younger*).

2. *Important State Interests*

[4] California's attorney disciplinary proceedings implicate important state interests. *See Middlesex*, 457 U.S. at 434 ("The State . . . has an extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses.").

3. *Opportunity to Present Federal Claims*

[5] The California Constitution precludes the Bar Court from considering federal constitutional claims. *See* Calif. Const. art. III, § 3.5. However, such claims may be raised in judicial review of the Bar Court's decision. This opportunity satisfies the third requirement of *Younger*. *See Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 629 (1986); *Kenneally v. Lungren*, 967 F.2d 329, 332 (9th Cir. 1992).

[6] Appellants contend their opportunity for judicial review is inadequate because it is wholly discretionary.[2] Judicial review is inadequate only when state procedural law *bars* presentation of the federal claims. *See Partington*, 880 F.2d at 123; *accord Moore v. Sims*, 442 U.S. 415, 430 & n.12 (1979) (finding abstention appropriate because state law did not impose procedural barriers to raising constitutional claims). The fact that review is discretionary does not bar presentation of appellants' federal claims — appellants can raise the claims in a petition for review. *See Beltran*, 871 F.2d at 781, 783 (opportunity to present federal claims in a petition for writ of review is sufficient to trigger *Younger* abstention, even though the court of appeal simply "denied the petition without elaboration"); *Martori Bros. Distribs. v. James-Massengale*, 781 F.2d 1349, 1352, 1354 (9th Cir.), *amended on other grounds*, 791 F.2d 799 (9th Cir. 1986) (opportunity to raise federal claims in petition for review satisfied the

[2]Hirsh also argues that the California Supreme Court's summary denial of his interim motion precluded judicial review of his federal claims. This contention is meritless — Hirsh can raise those claims in his petition for review following the conclusion of disciplinary proceedings in the Bar Court and has stated his intention to do so. *See Mason v. Departmental Disciplinary Comm.*, 894 F.2d 512, 515 (2nd Cir. 1990) (a state court's "refusal to halt the [attorney disciplinary] inquiry at its incipient stage provides no basis for believing that [the court] will be reluctant to entertain any legitimate objections [the attorney] may have in the event that disciplinary sanctions are improperly imposed").

requirements of *Younger* even though a reviewing court could deny the petition summarily); *Fresh Int'l Corp. v. ALRB*, 805 F.2d 1353, 1362 (9th Cir. 1986) (finding abstention applicable because plaintiff "could have presented [its federal claim] to the court of appeal in its petition for review").

The California Supreme Court's rules state that Bar Court decisions will be reviewed "when it appears . . . necessary to settle important questions of law." Calif. Court Rule 954(a). The court has considered federal constitutional challenges to the attorney disciplinary procedure. *See, e.g., Lebbos v. State Bar*, 53 Cal. 3d 37, 48 (1991). Refusing to abstain would require presuming that the California Supreme Court will not adequately safeguard federal constitutional rights, a presumption the U.S. Supreme Court squarely rejected in *Middlesex*. 457 U.S. at 431. Accordingly, the third requirement for *Younger* abstention test was satisfied.

B. Applicability of Exceptions to Abstention

1. *Bias*

[7] Although a federal court is normally required to abstain if the three prongs of the *Younger* test are satisfied, abstention is inappropriate in the "extraordinary circumstance" that the state tribunal is incompetent by reason of bias. *See Gibson v. Berryhill*, 411 U.S. 564, 577-79 (1973). However, "one who alleges bias 'must overcome a presumption of honesty and integrity in those serving as adjudicators.' " *Kenneally*, 967 F.2d at 333 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). Appellants failed to overcome this presumption.

[8] Appellants contend California Supreme Court justices and Bar Court judges have a direct and substantial financial interest in the outcome of disciplinary hearings. *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 824-25 (1986). However, appellants offer no evidence that the justices or judges receive improper payments to influence attorney disciplinary

proceedings or that they are competitors who might have a financial interest in seeing appellants disbarred. *See Gibson*, 411 U.S. at 577-79 (optometrists who sat on licensing board were biased because of their financial interest in the outcome of hearings to revoke the licenses of optometrists with whom they competed).

[9] The fact that fines imposed in attorney disciplinary proceedings are paid to the treasury of the State Bar does not establish an impermissible financial interest. Although the State Bar pays the salaries of the Bar Court judges, the salaries are set by statute, *see* Cal. Bus. & Prof. Code § 6079(d), and no evidence suggests that they are in any way dependent on the amount of fines collected or that the State Bar would be unable to pay the salaries of Bar Court judges without the money collected in disciplinary proceedings, which totals less than 1% of the State Bar's revenues.[3]

[10] Appellants offer only conjecture in support of their claim that Supreme Court justices are impermissibly biased because they appoint Bar Court judges. As the district court noted, district court judges are not deemed incompetent to review the findings of magistrate judges whom they participate in appointing. *Compare Vanelli v. Reynolds Sch. Dist. No. 7*, 667 F.2d 773, 779-80 & n.10 (9th Cir. 1982) (school board reviewing *its own* prior decision was not impermissibly biased).

[11] The absence of a mandatory statutory recusal mechanism applicable to justices of the California Supreme Court

[3]This fact distinguishes the present case from *In the Matter of Ross*, 656 P.2d 832 (Nev. 1983), in which the Nevada attorney disciplinary system was deemed to violate due process in part because disciplinary fines were a crucial source of revenues for the State Bar. *Id.* at 836. Moreover, the adjudicators under the Nevada system were the State Bar Board of Governors, who were also responsible for the financial integrity of the bar. *Id.* No such commingling of functions exists under the California disciplinary system.

does not make a showing of bias unnecessary. The case upon which the appellants rely, *Flangas v. State Bar of Nevada*, 655 F.2d 946 (9th Cir. 1981), held only that the court would not consider the bias exception to *Younger* because the plaintiff had not exhausted his state court remedies by invoking the available statutory recusal procedure. *See id.* at 950. *Flangas* did not imply that the absence of a particular recusal mechanism made it unnecessary to consider whether bias existed in fact.

Finally, appellants suggest the disciplinary process is tainted by bias because the State Bar has both investigative and adjudicative functions. However, the Supreme Court has rejected the contention that such a combination necessarily creates an unacceptable risk of bias. Such decisionmakers are still entitled to a presumption of honesty and integrity when serving as adjudicators. *See Withrow*, 421 U.S. at 47. Appellants offer no evidence to rebut this presumption.

2. *Patent Unconstitutionality*

[12] We reject appellants' contention that abstention is inapplicable because the California disciplinary system allegedly involves an unconstitutional delegation of power, violates separation of powers, and deprives appellants of a right to vote.[4] The California Supreme Court has previously rejected similar constitutional challenges on the ground the Bar Court functions as an administrative arm of the Court, which maintains final authority over discipline. *See Lebbos v. State Bar*, 53 Cal. 3d 37, 48 (1991). In any case, regardless of the ultimate merits of these claims, the pertinent statutes are not " 'flagrantly and patently violative of express constitutional prohibitions in every clause, sentence, and paragraph, and in whatever manner and against whomever an effort

[4]It is unclear whether any of these claims state a violation of a federal, as opposed to a state, constitutional guarantee. We need not reach that issue.

might be made to apply it.' " *Younger*, 401 U.S. at 53-54 (quoting *Watson v. Buck*, 313 U.S. 387, 402 (1941)). Accordingly, any violation would not justify refusal to abstain.

III. *Dismissal of Claims for Monetary Relief*

[13] All of the defendants are immune from liability for monetary damages.[6] The Eleventh Amendment's grant of sovereign immunity bars monetary relief from state agencies such as California's Bar Association and Bar Court. *See Lupert v. California State Bar*, 761 F.2d 1325, 1327 (9th Cir. 1985). This immunity extends to the individual defendants acting in their official capacities. *See Pena v. Gardner*, 976 F.2d 469, 472 (9th Cir. 1992); *see also Hafer v. Melo*, 112 S. Ct. 358, 361-62 (1991) (holding that a defendant official acting in his official capacity receives the same immunity as the government agency to which he belongs).

[14] The individual defendants are also immune in their individual capacities. The justices of the California Supreme Court have absolute immunity for their role in reviewing the recommendations of the Bar Court. *See Rosenthal v. Justices of the Supreme Court of California*, 910 F.2d 561, 565-66 (9th Cir. 1990). They are also entitled to absolute legislative immunity for actions relating to the promulgation of disciplinary rules. *See Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 734 (1980).

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[6]The district court relied on *Younger* abstention as its basis for dismissing the monetary claims. However, the applicability of *Younger* abstention to appellants' monetary claims is unclear. *Compare Mann v. Jett*, 781 F.2d 1448, 1449 (9th Cir. 1986) (abstaining in a § 1983 action because "such an action would have had a substantially disruptive effect upon ongoing state [ ] proceedings") *with Lebbos v. Judges of the Superior Court*, 883 F.2d 810, 816-17 (9th Cir. 1989) (suggesting that abstention is inappropriate where ongoing state proceeding afforded no opportunity for the plaintiffs to receive monetary relief); *see also Deakins v. Monaghan*, 484 U.S. 193, 202 (1988) ("[T]he District Court has no discretion to dismiss rather than to stay claims for monetary relief that cannot be redressed in the state proceeding."). We decline to address the issue here.

The Bar Court judges and prosecutors have quasi-judicial immunity from monetary damages. Administrative law judges and agency prosecuting attorneys are entitled to quasi-judicial immunity so long as they perform functions similar to judges and prosecutors in a setting like that of a court. *Butz v. Economou*, 438 U.S. 478, 511-17 (1978). The factors cited by the *Butz* Court apply equally to the personnel of the Bar Court — hearings are adversarial, errors are correctable on appeal, the judges make factual findings and perform other adjudicatory functions, and Bar Court decisions are controversial enough to stimulate harassing damage actions against the adjudicators, as this case illustrates. *See id.* Thus, the Bar Court judges and prosecutors are immune from damages. *See Clark v. State of Washington* 366 F.2d 678, 681 (9th Cir. 1966) (holding that Bar Association prosecuting attorney was entitled to immunity).

Finally, the California Attorney General is entitled to absolute prosecutorial immunity for his limited role in the disciplinary system. *See Imbler v. Pachtman*, 424 U.S. 409, 427 (1976).

IV. *Espinoza's Recusal Motion*

Judge Huff did not abuse her discretion by denying the motion for recusal. She is not a member of the State Bar and noted that the California Constitution forbids such membership. Cal. Const. art. VI, § 9. Although Judge Huff occasionally participated in State Bar activities, she was not paid, except for reimbursement of expenses. We reject Espinoza's contention that, "a reasonable person with knowledge of all the facts would conclude that [Judge Huff's] impartiality might reasonably be questioned." *Yagman v. Republic Ins.*, 987 F.2d 622, 626 (9th Cir. 1993).

AFFIRMED.